IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs September 17, 2008

STATE OF TENNESSEE v. RUSSELL LEE HOUSE

Direct Appeal from the Criminal Court for Sumner County
No. 496-2006 Dee David Gay, Judge

No. M2008-00032-CCA-R3-CD - Filed December 8, 2008

A jury convicted the Defendant, Russell Lee House, of two counts of selling less than .5 grams of a schedule II controlled substance, Class C felonies. The trial court sentenced the Defendant to serve two concurrent six-year sentences in the Tennessee Department of Correction ("TDOC") and ordered him to pay $60,000 in fines. The Defendant appeals, contending: (1) the evidence was insufficient to support his convictions; (2) the trial court improperly imposed the fines; and (3) the trial court erred when it ordered the Defendant to serve two concurrent six-year sentences. After reviewing the record, we affirm in part and reverse in part the judgments of the trial court, and remand for additional proceedings regarding imposition of fines.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed in Part, Reversed in Part, and Remanded

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JAMES CURWOOD WITT JR. and J.C. MCLIN, JJ., joined.

David R. Howard, Gallatin, Tennessee, for the Appellant, Russell Lee House.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Matthew Bryant Haskell, Assistant Attorney General; L. Ray Whitley, District Attorney General; Lytle Anthony James and Sallie Wade Brown, Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION

I. Facts

A. Jury Trial

This case arises from the Defendant's sales of cocaine on January 23 and 25, 2006, for which he was charged with two counts of sale of a schedule II controlled substance in an amount of .5

grams or more. At his jury trial, the following evidence was presented: Shane Woodard, a sergeant with the Gallatin Police Department, assigned to the Sumner County Drug Task Force, explained that, after Kimberly Thompson informed his department she could buy cocaine from the Defendant, he prepared to execute a "controlled buy" of illegal narcotics. He testified that he and Investigator Jerry Carpenter met with Thompson on January 23, 2006, and observed Thompson call the Defendant to arrange to purchase cocaine from him. According to Sergeant Woodard, both Thompson and the Defendant agreed to an amount of and price for cocaine, and they agreed to meet at an automotive shop. The Sergeant stated that he and Carpenter photocopied the bills that would be exchanged for the cocaine, searched Thompson's person and car, and equipped Thompson with a body wire.

Sergeant Woodard testified that Thompson then drove to the automotive shop while he and Carpenter followed Thompson and parked approximately fifty yards away in a nearby parking lot. He stated that, although a tree line separated the parking lot from the automotive shop, he could see the automotive shop because the winter weather had left the trees barren. After the transaction was complete, the officers met Thompson at a prearranged location, recovered the narcotics, and again searched her person and her car.

Sergeant Woodard recounted that two days later, on January 25, 2006, he and Carpenter again met with Thompson and observed her arrange another transaction with the Defendant. He testified that, as before, he and Carpenter photocopied the bills to be used in the exchange, searched Thompson's person and car, and equipped Thompson with a body wire. Sergeant Woodard explained, however, that he and Thompson drove separately to observe the second exchange. The Sergeant parked behind a nearby restaurant, observed the Defendant arrive in a blue Buick, and recorded the Buick's tag number. After the transaction was complete and the Sergeant reunited with Thompson and Investigator Carpenter, he and Investigator Carpenter retrieved the narcotics and searched Thompson's person and car as before. He stated that as a matter of general practice he never delivered material to the evidence room of the police department but instead would immediately give the material to Carpenter.

On cross-examination, Sergeant Woodard testified that, although he could not recall the quality of the recordings of the phone calls at issue, digital recordings generally are very decipherable. He stated his department had worked with Thompson numerous times before January of 2006, and Thompson had produced high quality work. Sergeant Woodard explained that Thompson had worked in exchange for both money and leniency on criminal charges against Thompson. He stated that he knew of Thompson's prior arrest for filing a false police report. Sergeant Woodard conceded he could not identify the Defendant as the person with whom Thompson interacted during either of the two transactions. On re-direct examination, the Sergeant reiterated that, although he was unable to ascertain the identity of the person with whom Thompson interacted, he observed and recorded the tag number of the person's car.

Kimberly Thompson testified about the events of January 2006 and confirmed Sergeant Woodard's testimony. Thompson specified that before each controlled buy, she agreed to buy forty

dollars worth of cocaine from the Defendant. She elaborated that, when she asked the Defendant if she could buy cocaine the second time, on January 25, the Defendant told her she would have to wait while he first obtained the cocaine. Thompson explained she called a few minutes later to let the Defendant know she was on her way, but the Defendant was not at the auto shop when she arrived, although an unidentified man was present. The Defendant soon arrived and exchanged cocaine for the marked bills.

Thompson stated that the first time she worked with the Gallatin Police Department as a confidential informant the Department withheld prosecution for possession of drug paraphenalia. She explained, however, that the department gave her only monetary compensation, as opposed to leniency on criminal charges, for buying drugs from the Defendant. Thompson identified the Defendant as the man from whom she bought drugs. She elaborated that she knew the Defendant through his son, Lamont House, and that she had only dealt with the Defendant in order to buy drugs. Thompson admitted she was addicted to cocaine at the time of the controlled buy and had been convicted of misdemeanor possession of drug paraphenalia.

On cross-examination, Thompson admitted she had been charged with, although never convicted of, possession of cocaine and filing a false police report. Thompson testified that before the controlled buy at issue she had bought drugs from the Defendant's son, with whom she insisted she did not have a romantic relationship. She explained that she used drugs during and after the period in which she was a confidential informant for the Gallatin Police Department, and she last purchased drugs from the Defendant's son six months after the controlled buy, which was a year before trial. She confirmed she initiated the buy; the police had not requested her assistance. Thompson said that on the day of the buy she took Hydrocodone and Xanax, both of which she had been prescribed.

The State next called Jerry Carpenter, the Gallatin Police Department investigator in charge of the case against the Defendant. Investigator Carpenter echoed Sergeant Woodard and Kimberly Thompson's account of the exchanges on January 23 and 25, 2006. Regarding the January 23 buy, Investigator Carpenter said he, like Sergeant Woodard, could not identify the man who handed Thompson the drugs. After retrieving the packet from the buy on January 23 from Thompson, Investigator Carpenter said he placed the packet within an evidence bag and labeled and sealed the bag.

Regarding the buy on January 25, 2006, Investigator Carpenter explained that he parked in the same location in which he and Sergeant Woodard parked during the first buy. He testified, however, that on this occasion he was able to identify the Defendant as the person giving drugs to Thompson. Investigator Carpenter explained that having arrived before the Defendant, unlike during the first buy, he was able to exit his car and go up to the tree line area where he could "maintain some cover but still get a better look at what was going on . . . ." Investigator Carpenter testified he was certain the Defendant handed Thompson the drugs.

Investigator Carpenter explained that Sergeant Woodard retrieved the package from

Thompson, sealed it, and handed it to Investigator Carpenter. He recounted how he returned to the office and sealed and labeled the package as he had the first package. Investigator Carpenter identified both packages entered into evidence by the State as those which he and Sergeant Woodard received from Thompson during January 2006.

Regarding his dealings with Thompson, Investigator Carpenter testified he had worked with her approximately ten times and had never perceived her to be "hard to work with, untruthful." He explained that the people with whom he collaborated on controlled buys ordinarily have a history of drug abuse and criminal violations but that such people are necessary to complete the controlled buys. He said he has used hundreds of confidential informants over the course of his twenty year career in law enforcement.

On cross-examination, Investigator Carpenter said he had received reports that the Defendant had sold drugs before January 2006, but he did not have any substantive evidence proving such. Investigator Carpenter said he was aware Thompson was using Hydrocodone and Xanax (for which Thompson presented him with prescription bottles) during each of the controlled buys. However, she did not appear to Carpenter to be under the influence of drugs during either of the controlled buys. Investigator Carpenter explained that he had dealt with the Defendant's sons before January 2006, but he insisted that this familiarity did not affect his certainty that the Defendant was the man he observed hand Thompson drugs on January 25.

The State then presented several witnesses who testified about their role in the chain of custody of the bags taken from the confidential informant. Glenn Everett, a forensic scientist with the TBI, identified a clear baggie that contained a substance he determined was .28 grams of cocaine base. Mark Dunlap, also a forensic scientist with the TBI, identified a second baggie that contained a substance he determined was .28 grams of cocaine.

After hearing the evidence described above, the jury convicted the Defendant of two counts of selling less than .5 grams of a schedule II controlled substance. The jury set a $20,000 fine for Count One and a $40,000 fine for Count Two.

B. Sentencing Hearing

The following evidence was presented at the sentencing hearing on September 7, 2007: the State entered a presentence report wherein the Defendant stated he had never sold drugs. The presentence report detailed the Defendant's criminal history. The Defendant accumulated at least twelve traffic violations between 1967 and the date of the trial. In addition to these, the Defendant has at least one conviction for each of the following offenses: passing a worthless check, failure to appear, assault and battery, assault with knife, aggravated perjury, and contributing to the delinquency of a minor. The Defendant was on an appellate bond from his aggravated perjury conviction when he committed the offense at issue.

The defense called Isaac Williams, the Defendant's pastor and friend of thirty years, who

claimed that the Defendant was a "good candidate for rehabilitation." Williams testified that the Defendant was "a good man really" and that he had never heard the Defendant "even say a bad word." Williams said that selling drugs was "out of character" for the Defendant and a consequence of "just not making sound decisions." He expressed his belief that the Defendant's recent conduct was an aberration, the result of "struggles in his life" and "temptation." Williams stated that the Defendant was a very friendly, hard-working man who he believed would complete probation if the trial court granted it.

On cross-examination, Williams conceded that he was unaware that the Defendant had sold drugs "not once but twice" and that the Defendant had convictions of assault, contributing to the delinquency of a minor, and passing a worthless check.

Annie House testified on behalf of the Defendant, her husband. She first conveyed her belief that her husband was a responsible "workaholic," who took care of his family. She contended that the Defendant could not have been selling drugs because his car was repossessed the month of the conduct at issue and "anybody that was selling drugs ought to have money to pay their car off." She further contended that the numerous traffic violations the Defendant committed were due to his job of driving trucks, not a disrespect for the law. She testified "[the Defendant] has made a lot of mistakes in these years. I'm not saying he's been perfect, but I have [n]ever know[n] him to be a drug dealer." House conveyed her belief that her husband would comply with any probation conditions set because he did not like jail.

On cross-examination, House conceded her knowledge of the Defendant's prior convictions for contributing to the delinquency of a minor, assault, and aggravated perjury. House stated that the Defendant did not contribute to the delinquency of the minor at issue, their niece. She explained that at the time the police apprehended the Defendant on that charge, the Defendant was in fact returning their niece to her group home instead of aiding her escape. Regarding the aggravated perjury conviction, House stated that the Defendant only inadvertently perjured himself because he did not understand the court's question. She acknowledged that each of her sons with the Defendant has used cocaine but denied that the Defendant ever provided their sons with drugs.

The Defendant took the stand and again stated that he had never sold cocaine. He emphasized that he had worked his entire life despite his lack of education, whereas many people with similar educational deficiencies "are just drawing checks." He stated that, although he did not like drugs, he could not avoid being around them. The Defendant emphasized that despite his innocence he would comply with any punishment that the trial court imposed. He concluded by insisting that the officer's testimony at trial that he had seen the Defendant from an adjacent lot was false because an overgrowth of weeds would have obstructed the officer's view.

After reviewing the evidence presented, the trial court sentenced the Defendant to two concurrent six-year prison sentences and imposed a $20,000 fine in Count One and a $40,000 fine in Count Two.

II. Analysis

A. Sufficiency of Evidence

The Defendant contends that the evidence was insufficient to support his Class C felony convictions of the sale of less than .5 grams of cocaine, a schedule II controlled substance, in violation of Tennessee Code Annotated § 39-17-417(a)(3) (2006). He particularly objects to the use of a confidential informant and to the quality of the evidence linking the Defendant to the January 25, 2006, controlled buy. The State answers that crediting the testimony of the confidential informant was within the discretion of the jury and that the identification of the Defendant as the perpetrator in each count was proven beyond a reasonable doubt.

When an accused challenges the sufficiency of the evidence, this Court's standard of review is whether, after considering the evidence in the light most favorable to the State, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *see* Tenn. R. App. P. 13(e); *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). "Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *Liakas*, 286 S.W.2d at 859. "'A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.'" *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978) (*State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973)). The Tennessee Supreme Court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (citing *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because

a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000).

On appeal, the Defendant cites as uncontroverted the following facts in contending the evidence is insufficient to support his convictions for sale of a schedule II controlled substance: (1) both officers were unable to identify the Defendant as the seller on January 23, 2006; (2) the only witness able to identify the Defendant as the seller on January 23, 2006, was the confidential informant, Thompson; (3) Thompson admittedly had incentive to falsely testify because she was paid for her services; (4) Thompson was addicted to cocaine at the time of the controlled buys; (5) Thompson was previously charged with filing a false police report; (6) no telephone records or digital recordings supported the State's claim that Thompson contacted the Defendant prior to the controlled buys; and (7) the State did not introduce the booking photo initially used by Thompson to identify the Defendant.

With regard to Count One, viewing the evidence presented at trial in the light most favorable to the State, on January 23, 2006, Sergeant Woodard and Investigator Carpenter observed Thompson place a telephone call and agree to meet someone in order to purchase drugs. Later that same day, Thompson gave forty dollars to a person she identified as the Defendant in exchange for a package containing a rock-like substance. The telephone exchange is sufficient evidence of the Defendant's knowledge the package that he transferred to Thompson contained a controlled substance. Thompson's identification of the Defendant as the man from whom she purchased the package is sufficient evidence that it was the Defendant who sold Thompson the package. Officers Carpenter and Woodard and agent Dehyle sealed, labeled, and stored the package from the January 23 buy to ensure that it was not altered before reaching the TBI crime lab. After the TBI received and securely stored the package, Agent Everett twice tested the substance within the package, and each test revealed the substance to be cocaine. Taken together, we conclude a rational jury could have found the essential elements of the offense with respect to the Defendant's selling cocaine to Thompson on January 23, 2006.

The evidence is also sufficient to sustain the Defendant's conviction in Count Two. The evidence proved Sergeant Woodard and Investigator Carpenter again observed Thompson place a call to the Defendant and agree to meet in order to purchase drugs from him on January 25, 2006. Later that day Investigator Carpenter observed a person he identified as the Defendant transfer a package, which contained a rock-like substance, to Thompson in exchange for forty dollars. Thompson also identified the person from whom she purchased the package as the Defendant. The January 25, 2006, telephone exchange between the Defendant and Thompson is sufficient evidence of the Defendant's knowledge that the package he transferred to Thompson contained a controlled substance. Investigator Carpenter and Thompson's identification of the Defendant as the person who transferred to Thompson the package is sufficient evidence that it was the Defendant who sold the package. Taken together, we conclude a rational jury could have found the essential elements of the offense with respect to the Defendant's selling cocaine to Thompson on January 25, 2006.

We conclude that there is sufficient evidence to sustain the Defendant's convictions. The Defendant is not entitled to relief on this issue.

B. Propriety of Fines Imposed

The Defendant contends that the trial court erred in imposing $60,000 in fines because it did not consider sentencing principles and other relevant factors before imposing the fines set by the jury. Further, the Defendant contends that sentencing principles, the Defendant's sparse criminal history, and his inability to pay a large fine do not justify the fines. The State answers that although the trial court did not explicitly weigh the relevant factors before imposing the fines, the sentencing principles, the Defendant's criminal history, and his inability to comply with release conditions justify the fines.

For all offenses punishable by a fine greater than fifty dollars, the Tennessee Code requires a jury to set a defendant's fine along with the judgment of conviction. T.C.A. § 40-35-301(b) (2006). However, the Code also explicitly instructs the trial court to impose such a fine, if any at all, only after holding a sentencing hearing. T.C.A. § 40-35-301(b). A trial court "may not simply impose fines as fixed by the jury," but instead, taking into account the evidence adduced at the sentencing hearing, must consider whether the fine set by the jury is justified. *State v. Blevins*, 968 S.W.2d 888, 895 (Tenn. Crim. App. 1997).

In determining whether to impose the fine set by the jury or to adjust the fine, the trial court must consider the sentencing principles of the 1989 Sentencing Act. *Taylor*, 70 S.W.3d at 722. Also relevant, though not controlling, is a defendant's ability to pay the fine. *State v. Bryant*, 108 S.W.3d 845, 854 (Tenn. 2003); *State v. Marshall*, 870 S.W.2d 532, 542 (Tenn. Crim. App. 1993) ("We recognize that an oppressive fine can disrupt future rehabilitation and prevent a defendant from becoming a productive member of society."), *overruled on other grounds by State v. Carter*, 988 S.W.2d 145 (Tenn. 1999). Finally, a trial court may base its imposition of a fine on the seriousness of the offense committed. *State v. Alvarado*, 961 S.W.2d 136, 153 (Tenn. Crim. App. 1996). Appellate courts may review a trial court's imposition of a fine to ensure that the trial court considered the factors mentioned above before imposing the fine. *State v. Taylor*, 70 S.W.3d 717, 722 (Tenn. 2002) (citing *State v. Bryant*, 805 S.W.2d 762, 767 (Tenn. 1991)).

Therefore, in the case under submission, we review the trial court's imposition of the fines to ensure that sentencing principles, the Defendant's ability to pay, and the seriousness of the offense justify the fines imposed. The jury was authorized to set a fine of not less than two thousand dollars but no more than one hundred thousand dollars for each count of selling a schedule II drug under .5 grams. T.C.A. §§ 39-17-428(b)(9), -417(c)(2) (2006). The jury found the Defendant guilty of two counts of selling a schedule II drug, and it set a $20,000 fine for the first count and a $40,000 fine for the second count. The trial court imposed the fines set by the jury.

After reviewing the record, we conclude the trial court did not properly review the fines set by the jury. During the sentencing hearing, defense counsel requested the judge reduce the fines set

by the jury to "make it a bit more realistic for [the Defendant's] means to do that." The trial court, however, refused to reduce the fine and expressed its belief that a defendant may not contest, and a judge should not review, a jury-set fine:

> [Y]ou talk about the $60,000 fine in this case, and let me remind, you . . . you're the one that wanted the jury trial in this case . . . . [T]his is what you wanted, and this is what you got . . . . So the $60,000 fine is something that a jury of your peers imposed after you wanted a jury trial. So that's something you have to live with, and I will not excuse the $60,000 fine.

The trial court repeated this sentiment in the subsequent hearing on the Defendant's motion for a new trial:

> I don't understand either the differences in the fines . . . but when we ask for a jury trial sometimes we can't complain about what we get. The jury heard this case and possible punishment . . . . It's not for us to second guess. . . . [T]he fines were the result of deliberations, and because of the evidence, if they were different amounts, there was a reason for that. And the fine was well within the range under the law as to the fine in this particular case for the sale of cocaine. . . . Maybe sometimes we need a fresh look so that we understand that every sale of cocaine is dangerous . . . . So I find that the fine rendered by the jury was not excessive.

The trial court, therefore, dismissed the defense counsel's objections to the fine largely based on its perception that jury-set fines are not reviewable, although the trial court mentioned in passing the gravity of drug offenses.

In the case under submission, the trial court failed to consider whether sentencing principles, the seriousness of the January 2006 controlled buys, and the Defendant's ability to pay justified the fines. Therefore, we vacate the portion of the trial court's judgment that imposes a $20,000 fine in Count One and a $40,000 fine in Count Two and remand the case for the trial court to determine what fines, if any, are justified by the sentencing principles, the Defendant's ability to pay, and the specific facts of these drug offenses.

C. Alternative Sentencing

The Defendant contends that the trial court erred when it denied him an alternative sentence. He specifically objects to the trial court's reliance on the fact that the offense involved illegal drugs when it denied him alternative sentencing. The Defendant maintains that such reliance countermands the intent of the legislature to implement alternative punishment for all offenders, regardless of the nature of the offense. The State answers that the record reflects that the trial court properly considered sentencing principles and followed statutory procedures when it sentenced the Defendant.

When a defendant challenges the length, range or manner of service of a sentence, this Court must conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, the burden is now on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm'n Cmts. This means that if the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record, and gave due consideration and proper weight to the factors and principles relevant to sentencing under the 1989 Sentencing Act, T.C.A. § 40-35-103 (2006), we may not disturb the sentence even if a different result was preferred. *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994).

When reviewing a trial court's denial of alternative sentencing, whether in the form of probation, split sentencing, or community corrections, this court conducts a *de novo* review with a presumption of correctness. T.C.A. § 40-35-402(d); *State v. Mencer*, 798 S.W.2d 543, 549 (Tenn. Crim. App. 1990) (finding community corrections to be a form of alternative sentencing and therefore holding the *de novo* standard of review of T.C.A.§ 40-35-402(d) to apply to community corrections); State *v. Taylor*, 744 S.W.2d 919, 920 (Tenn. Crim. App. 1987).

Due to the 2005 sentencing amendments, a defendant is no longer presumed to be a favorable candidate for alternative sentencing. *State v. Carter*, 254 S.W.3d 335, 347 (Tenn. 2008) (citing T.C.A.§ 40-35-102(6) (2006)). Instead, a defendant not within "the parameters of subdivision (5) [of T.C.A. § 40-35-102], and who is an especially mitigated or standard offender convicted of a Class C, D or E felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." *Id.* (footnote omitted). T.C.A. § 40-35-102(6); 2007 Tenn. Pub. Acts 512. Additionally, we note that a trial court is "not bound" by the advisory sentencing guidelines; rather, it "shall *consider*" them. T.C.A.§ 40-35-102(6) (emphasis added).

If a defendant seeks probation, then that defendant bears the burden of "establishing [his] suitability." T.C.A. § 40-35-303(b) (2006). As the Sentencing Commission points out, "even though probation must be automatically considered as a sentencing option for eligible defendants, the defendant is not automatically entitled to probation as a matter of law." T.C.A. § 40-35-303 (2006), Sentencing Comm'n Cmts.

> When sentencing the defendant to confinement, a trial court should consider whether:
> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

T.C.A. § 40-35-103 (2006). A Defendant must satisfy the following additional factors defendant to be eligible to serve his sentence within a Community Corrections program:

(B) Persons who are convicted of property-related, or drug-or alcohol-related felony offenses or other felony offenses not involving crimes against the person as provided in title 39, chapter 13, parts 1-5;

(C) Persons who are convicted of nonviolent felony offenses;

(D) Persons who are convicted of felony offenses in which the use or possession of a weapon was not involved;

(E) Persons who do not demonstrate a present or past pattern of behavior indicating violence;

(F) Persons who do not demonstrate a pattern of committing violent offenses;

T. C. A. § 40-36-106(a)(1) (2006). A trial court retains discretion to deny community corrections if it finds the sentencing principles to require confinement. *State v. Kendrick*, 10 S.W.3d 650, 656 (Tenn. Crim. App. 1999). Also, the trial court may consider the mitigating and enhancement factors set forth in T.C.A. §§ 40-35-113-14. T.C.A. § 40-35-210(b)(5); *State v. Boston*, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996). Finally, a trial court should consider a defendant's potential or lack of potential for rehabilitation when determining whether confinement is appropriate. T.C.A. § 40-35-103(5); *Boston*, 938 S.W.2d at 438.

In our view, the trial court was within its discretion when it denied alternative sentencing in the case under submission. The Defendant is a standard offender convicted of two Class C felonies. T.C.A.§ 40-35-101 (2006). Therefore, the Defendant is a "favorable candidate" for alternative sentencing absent evidence to the contrary. T.C.A.§ 40-35-102(6). However, the Defendant's criminal history and lack of rehabilitative potential support the trial court's judgment that sentences of incarceration are appropriate.

First, the Defendant's failure to accept responsibility indicates he is not likely to rehabilitate himself. Both at trial and at the sentencing hearing, the Defendant repeatedly maintained his innocence, claiming the confidential informant lied about buying drugs from him because of her romantic relationship with one of his sons. However, as the trial court noted, "Where does truth fit into rehabilitation? . . . How can [the Defendant] be amenable to correction if he denies the truth? And the truth is . . . the [D]efendant sold cocaine . . . ." The court added "until [the Defendant] come[s] to grips with that, I don't know how [he] can be amenable to correction." The Defendant's failure to accept responsibility for his criminal behavior indicates his lack of rehabilitative potential, and thus indicates confinement is necessary.

The Defendant's past criminal history also indicates confinement is necessary. T.C.A. § 40-35-103(a) authorizes a court to deny alternative sentencing if "[c]onfinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct." Beginning in 1967, the Defendant committed several misdemeanors, including at least twelve traffic violations. The Defendant has at least one conviction for each of the following misdemeanor offenses: passing a worthless check, failure to appear, assault and battery, assault with knife, and contributing to delinquency of a minor. In addition, the Defendant was recently convicted of aggravated perjury, which is a felony. The Defendant has a significant record of committing criminal offenses. We conclude, as the trial court found, that the Defendant's long criminal history requires a sentence of confinement.

The Defendant contends that by relying on the nature of his offense (sale of narcotics) when it denied alternative sentencing, the trial court frustrated the Legislature's goal of implementing alternative sentences for all offenders. The trial court did partially base its denial on the drug-related nature of the offense. However, the court also cited the drug-related nature of the offense in finding that the deterrence was especially desirable in the Defendant's situation. The trial court noted the high incidence of cocaine use in Sumner County:

> There's no telling . . . how much cocaine has been sold this morning since we've been in court in Gallatin, Sumner County, Tennessee. And for someone that's maybe even thinking about selling cocaine to hear that Mr. House went to the penitentiary because he sold cocaine two times, that might make them think a little bit. The deterrent effect is great, absolutely great. . . .
>
> . . .
>
> I find that confinement is necessary to avoid depreciating the seriousness of the offense, and particularly to provide an effective deterrence to others likely to commit similar crimes.

As set out above, the trial court properly relied on the Defendant's lack of rehabilitative potential, his long criminal history, and deterrence as reasons to impose a sentence of incarceration.

As discussed above, the trial court properly found that sentencing principles required the Defendant's confinement. Therefore, the trial court also properly denied the Defendant's request for community corrections.

D. Length of Sentence

The Defendant contends that the trial court "abused its discretion" by improperly weighing the enhancement factors when it sentenced he Defendant. The State answers that the trial court's weighing of enhancement factors is not subject to review.

When reviewing the length of the sentence imposed by the trial court, this court conducts a *de novo* review with a presumption of correctness. T.C.A. § 40-35-402(d). Specific to the review of the trial court's finding enhancement and mitigating factors, "the 2005 amendments deleted as grounds for appeal a claim that the trial court did not weigh properly the enhancement and mitigating factors." *State v. Carter*, 254 S.W.3d 335, 344 (Tenn. 2008). The Tennessee Supreme Court continued, "An appellate court is therefore bound by a trial court's decision as to the length of the sentence imposed so long as it is imposed in a manner consistent with the purposes and principles set out in sections -102 and -103 of the Sentencing Act." *Id.* at 346.

In conducting a de novo review of the length of sentence, we must consider: (1) any evidence received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing, (4) the arguments of counsel relative to sentencing alternatives, (5) the nature and characteristics of the offense, (6) any mitigating or enhancement factors, (7) any statements made by the defendant on his or her own behalf and (8) the defendant's potential or lack of potential for rehabilitation or treatment. *See* T.C.A. § 40-35-210 (2006); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).

In summary, we review the length of the sentence imposed by the trial court *do novo* and presume it to be correct as long as the record reflects that the trial court considered the relevant sentencing principles. T.C.A. § 40-35-402(d). Furthermore, we do not review the trial court's weighing of enhancement factors, although we do review the basis for findings thereof. *Carter*, 254 S.W.3d at 344.

In the case under submission, the Defendant was convicted of two counts of selling less than .5 grams of cocaine, a schedule II substance, Class C felonies, for which the Tennessee Code authorizes a sentence for each count of not less than three nor more than six years. T.C.A.§ 40-35-112(3) (2006). In sentencing the Defendant, the trial court determined that the Defendant had a previous history of criminal convictions in addition to those necessary to establish the range and that the Defendant was released on appellate bond when he committed these felonies. T.C.A.§ 40-35-114(1), (13)(A) (2006). The trial court found that no mitigating factors applied to the Defendant and sentenced him to two concurrent six-year prison sentences.

The Defendant's presentence report reveals the Defendant has convictions for assault, assault and battery, domestic assault, failure to appear, aggravated perjury, passing a worthless check, and contributing to the delinquency of a minor. These convictions support the trial court's finding of enhancement factor (1), that the Defendant has a previous history of criminal convictions. T.C.A.§ 40-35-114(1). Likewise, the Defendant conceded at the sentencing hearing that he was on an appellate bond from his aggravated perjury conviction and that his conviction was ultimately affirmed. This concession supports the trial court's finding of enhancement factor (13)(A), that at the time the Defendant committed the felony he was released on bail and ultimately convicted of offense at issue. T.C.A. § 40-35-114(13)(A).

In summary, the record supports the trial court's findings of enhancement factors (1) and

(13)(A). Furthermore, as discussed above, the trial court considered the Defendant's lack of rehabilitative potential and the deterrent value of confinement when determining the length of the Defendant's sentence. We conclude the trial court properly based the Defendant's sentence on the relevant sentencing principles. Accordingly, we affirm the judgments of the trial court ordering the Defendant to serve two concurrent six-year sentences in the TDOC.

III. Conclusion

After a thorough review of the record and relevant authorities, we conclude the evidence was sufficient to convict the Defendant, the trial court properly denied alternative sentencing, and it properly ordered the Defendant to serve six years in confinement. However, we conclude that the trial court improperly imposed the $20,000 and $40,000 fines set by the jury. Accordingly, we affirm in part and reverse in part the judgments of the trial court, and remand this case for additional proceedings to determine whether the relevant factors justify the fines.

_____

ROBERT W. WEDEMEYER